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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

WOLFGANG SCHUG, M.D.,

Petitioner,

vs.

DAVID BURROWS, successor-in-interest to Cody Burrows, deceased; DAVID BURROWS and RHODA THOMAS individually and as heirs and surviving parents of Cody Burrows,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This case raises the following question of first impression for this Court as to which there is not uniformity among the circuits:

   - **Should this Court recognize a medical peer review privilege through the application of federal common law or comity in deference to the privilege recognized by all 50 states and the District of Columbia?**

2. This case raises a question specifically left open by this Court in *Jaffee v. Redmond*, 518 U.S. 1, 15 n.15 (1996):

   - **Is a defendant in a federal question case against whom only state claims are asserted protected by state evidentiary privileges under Federal Rule of Evidence 501?**

3. Finally, this case raises a procedural and jurisdictional question as to which there is conflict among the circuits:

   - **May a party who would be irreparably harmed by a loss of confidentiality take an interlocutory appeal to challenge a discovery order directing another party to disclose privileged materials?**

LIST OF PARTIES

In addition to the parties listed in the caption of the case on the cover, Redbud Community Hospital and Adventist Health, Inc. will be filing a separate petition for certiorari.

Janzen, Johnston & Rockwell Medical Management Services Group, Dr. Schug's medical group, is a party to the underlying action but not to the appellate proceedings under review, and was just granted summary judgment.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Wolfgang Schug, M.D., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the United States District Court for the Northern District of California refusing to recognize the existence of a peer review privilege protecting physicians and hospitals as a matter of federal law, federal-state comity, or state law pursuant to Federal Rule of Evidence 501 is found at Appendix D. The Court declined to change its ruling on rehearing. (*See* Appendix C.) The ruling on appeal and denial of writ relief by the United States Court of Appeals for the Ninth Circuit is reproduced as Appendix B. The Ninth Circuit's ruling on Dr. Schug's petition for rehearing and suggestion for rehearing *en banc* is reproduced as Appendix A. All of the opinions below are unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The United States Court of Appeals for the Ninth Circuit decided this case on November 16, 1998, and denied Dr. Schug's timely Petition for Rehearing on December 31, 1998. This petition, therefore, is timely under Rule 13.3 of this Court.

THE STATE PRIVILEGE STATUTE AND THE FEDERAL RULE OF EVIDENCE INVOLVED

The California statute protecting the confidentiality of medical peer review is California Evidence Code § 1157 (Appendix E), which will or will not be applicable under Federal Rule of Evidence 501, depending on the decision of this Court.

STATEMENT OF THE CASE

Petitioner Wolfgang Schug, M.D., is an emergency room physician at Redbud Community Hospital in the small rural town of Clearlake, California. In February 1996, Dr. Schug treated an infant on two occasions over three days. Dr. Schug ultimately determined that the boy would be better served at Santa Rosa Community Hospital, a larger hospital with more advanced pediatric services, which is about an hour from Clearlake. Unfortunately, the child suffered a cardiac arrest shortly after reaching Santa Rosa and died after subsequent transfer to the University of California Medical Center in San Francisco. The peer review committee at Redbud Hospital later met with Dr. Schug to evaluate his care of the patient.

Some months thereafter, the survivors filed suit in federal court against the hospital under the federal Emergency Medical Treatment and Active Labor Act

("EMTALA").[1] Petitioner Schug was permissively joined and named only in claims based on state law.[2]

During discovery, plaintiffs requested peer review records regarding Dr. Schug's care in this case from Redbud Hospital. The hospital refused, citing California Evidence Code § 1157, which prohibits the discovery of "records" and "proceedings" of "organized committees of medical . . . staffs in hospitals . . . having the responsibility of evaluation and improvement of the quality of the care rendered in the hospital." (*See* full text of § 1157 at Appendix E.)

On January 13, 1998 and again on May 5, 1998, the District Court ruled that the peer review records were discoverable. The court concluded that federal privilege law applies even to state law claims in federal question cases. (Appendices C and D.)

Because the District Court's order was not directed at him, Dr. Schug could not invite a contempt citation and take an interlocutory appeal therefrom; so he took a direct appeal to the Ninth Circuit Court of Appeals pursuant to this Court's ruling in *Perlman v. United States*, 247 U.S. 7 (1918) and also sought writ relief. On November 16, 1998, the Ninth Circuit (per Hug, C.J., Fletcher, J. and Trott, J.) summarily dismissed Dr. Schug's appeal and rejected his writ petition (Appendix B) then subsequently

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[1] 42 U.S.C. § 1395dd (1998).

[2] Dr. Schug is named in claims for medical malpractice and spoliation of evidence, the latter claim having been abolished by the California Supreme Court's recent decision in *Cedars-Sinai Med. Ctr. v. Superior Court (Bowyer)*, 18 Cal. 4th 1, 954 P.2d 511, 74 Cal.Rptr.2d 248 (1998).

denied rehearing (Appendix A). Dr. Schug brings this timely petition to review those orders.

SUMMARY OF REASONS WHY THIS PETITION SHOULD BE GRANTED

The quality of your next visit to your doctor, your sister's next surgery, the care your best friend will get in the Emergency Room if he or she has a heart attack – indeed the medical care of all Americans depends on what this Court does in this case.

Quality of medical care in this country is maintained through a system of peer review – doctors meeting as colleagues to critique their own care. Confidentiality is absolutely essential to candor; all 50 states have recognized this to be true by protecting peer review proceedings from discovery. Only the federal courts are out of step with the overwhelming public policy in favor of a medical peer review privilege.

In this case, Dr. Schug lost his right to the privilege by the mere happenstance that he was permissively joined in a federal suit against his hospital, despite the fact that he was only named in state law claims. This case, therefore, is not only a perfect vehicle to resolve the issue of whether there is a federal medical peer review privilege, but squarely presents the fact pattern anticipated by a question left open in *Jaffee v. Redmond*, 518 U.S. 1, 15 n.15 (1996), *i.e.*, what privilege law applies in mixed state and federal law actions? The case also presents an excellent vehicle for resolving the conflict among the circuits regarding the scope of the *Perlman* exception to the final

judgment rule and the right of direct appeal to enforce a privilege.

This case already has a high profile, having been the subject of inflammatory local, state and national publicity, which included a report on National Public Radio on February 3, 1998 and a story on ABC's *Prime Time Live* (March 18, 1998). The publicity was fueled by the filing of murder charges against Dr. Schug, which were subsequently summarily nonsuited for insufficient evidence. In view of the sensationalism already surrounding this case, it becomes an even better vehicle to emphasize the critical importance of maintaining peer review confidentiality regardless of the clamor.

ARGUMENT

I. THE MEDICAL PEER REVIEW PRIVILEGE AFFECTS THE QUALITY OF HEALTH CARE OF EVERY AMERICAN AND IS RECOGNIZED BY EACH OF THE 50 STATES.

Peer review is the cornerstone of quality assurance in modern medicine. Doctors are required to participate in peer review in hospitals, surgical centers, medical groups, HMOs and virtually any venue where medicine is practiced. It would be practically impossible to imagine how the quality of medical care would be monitored without active practitioner-to-practitioner peer review.

As recognized by every state, the District of Columbia and the United States Congress, the confidentiality of peer review proceedings is essential to assure open

exchange and real scrutiny. Now, depending on the circuit, federal courts may or may not protect the confidentiality of peer review. If there is a different federal standard, how should health care providers, who would otherwise rely on state privilege law, participate openly in peer review? They would never know if their words would be held in confidence or be used against them in federal litigation. Such a two-tiered system is out of step with the reason and the experience of the states and Congress, as evidenced by their statutory policies.

A. Peer Review is a Pervasive and Required Part of Health Care Delivery in Our Country.

Peer review is integrally interwoven into the fabric of modern American medicine. It is mandated by state statutes for the licensure of hospitals.[3] This mandate is in turn passed on to physicians by making participation in peer review a requirement for maintaining medical staff membership. As one commentator notes:

> Prompted by the need for open, candid evaluation of hospital procedures, nearly all hospitals in the United States have established a medical peer review system as a part of their operation. Many of these committees operate under state mandate or are required by federal law as a prerequisite to receiving funding for certain programs. In addition the Joint Commission on

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[3] *See, e.g.*, CAL. BUS. & PROF. CODE §§ 805.5, 2282 (West 1998); CAL. HEALTH & SAFETY CODE § 32128 (West 1998); CAL. CODE REGS. tit. 22, § 70703 (1998); 210 ILL. COMP. STAT. 85/10 (West 1998); IND. CODE ANN. § 16-21-2-7 (Michie 1998); OR. REV. STAT. § 441.055 (1998); MD. CODE ANN., HEALTH-GEN. § 19-319 (1998).

> Accreditation of Hospitals requires as a condition of accreditation that hospitals maintain a system of medical review evaluation of hospital operations.[4]

With the expansion of managed care, similar peer review guidelines have been set forth for accreditation of HMOs and other health plans by the National Committee for Quality Assurance. County, state and specialty medical societies also engage in peer review, and most state medical licensure boards rely to some degree on peer review evaluations. Thus, peer review is a required and pervasive institution found throughout our health care delivery system.

B. Confidentiality is Essential for the Functioning of Peer Review.

Courts and commentators have recognized that confidentiality is necessary for effective peer review. "As the system of peer review took hold among hospitals, the medical community realized that effective, scrupulous, and candid evaluations of the quality of medical care would be difficult, if not impossible, if peer review committee members were faced with the constant threat of pre-trial discovery in medical malpractice suits."[5] Historically, physicians have been reluctant to participate in peer

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[4] Charles David Creech, Comment, *The Medical Review Committee Privilege: A Jurisdictional Survey*, 67 N.C. L. Rev. 179, 179-180 (1988) (footnotes omitted).

[5] Sosi N. Biricik, Note, *Reconciling Section 1157, Elam, and West Covina Hospital: Is The Sanctity of the Hospital Peer Review Committee Salvageable?*, 61 S. Cal. L. Rev. 183, 187 (1987).

review for fear of loss of referrals from other doctors, accusations of defamation, and the ever present threat of becoming involved in litigation.[6] For this reason, the guarantee of confidentiality became necessary to assure the meaningful participation of physicians in peer review.

Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973) (per Corcoran, J.) was the first opinion to address the peer review privilege at the federal level, and it remains the leading case. As recognized in *Bredice*, the policies supporting the peer review confidentiality are clear:

> Confidentiality is essential to effective functioning of these [peer review] staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a sine qua non of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit.[7]

Candid self-assessment is the primary means of ensuring a high standard of professionalism in the

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[6] Charles David Creech, Comment, *The Medical Review Committee Privilege: A Jurisdictional Survey*, 67 N.C. L. Rev. 179, 179-180 (1988).

[7] *Id.* at 250; *see also Memorial Hosp. v. Shadur*, 664 F.2d 1058, 1062 (7th Cir. 1981) (quoting *Bredice*).

medical community. Peer review, however, will not work – physicians will not engage in the sort of positive self-analysis envisioned by policymakers at every level – if it is open to discovery in federal court. The lack of confidentiality in federal courts effectively negates the confidentiality conferred on the peer review process by every state.

C. The Policy of All 50 States, the District of Columbia and the United States Congress is to Protect the Confidentiality of Peer Review.

Recognizing the vital role of peer review and the necessity of maintaining peer review confidentiality, all the states of the Union, as well as the United States Congress and the District of Columbia, have endorsed a privilege protecting the information disclosed at peer review sessions.

Congress has clearly expressed its desire to promote and protect medical peer review. To ensure access to and provision of high quality health care Congress enacted the Health Care Quality Improvement Act, 42 U.S.C. §§ 11101 *et seq.*, including provisions promoting peer review and assuring confidentiality of information required therein.[8] Key Congressional reasons for enacting this law are instructive:

> (1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems

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[8] *See, e.g.*, 42 U.S.C. §§ 11111, 11112, 11137 (1998).

> that warrant greater efforts than those that can be undertaken by any individual State. . . .
>
> (3) This nationwide problem can be remedied through effective professional peer review. . . .
>
> (5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.[9]

The public policy in favor of confidentiality in peer review has been recognized and addressed by all 50 states and the District of Columbia.[10] Every one of these jurisdictions has passed a peer review privilege statute. A chart listing these statutes appears at Appendix F. As the Court explained in *Jaffee*:

> Because state legislatures are fully aware of the need to protect the integrity of the fact finding functions of their courts, the existence of a consensus among the States indicates that "reason and experience" support recognition of the privilege. . . . [A]ny State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court. Denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications.[11]

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[9] 42 U.S.C. § 11101 (1998).

[10] In addition to the states, Congress has created a medical quality assurance privilege for Veterans' Administration hospitals (38 U.S.C. § 5705 (1998)) and the Department of Defense (10 U.S.C. § 1102 (1998)).

[11] *Jaffee v. Redmond*, 518 U.S. 1, 13 (1996).

The repeated expressions of public policy in the Congressional and state statutes present a compelling reason why this Court should grant certiorari to bring all federal courts in line on this issue.[12] A decision by this Court would not only cure an unwanted disparity between state and federal law, but would also safeguard the effective monitoring of health care quality nationwide.

D. Comity Should Be Accorded State Medical Peer Review Privileges.

Comity is an aspect of the doctrine of judicial restraint whereby federal courts accede to state laws for reasons of policy or courtesy. In *Memorial Hosp. v. Shadur*, 664 F.2d 1058, 1061 (7th Cir. 1981), the Seventh Circuit explained the federal law of comity with regard to state privileges:

> A strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy. And where a state holds out the expectation of protection to its citizens, they should not be disappointed by a mechanical and unnecessary application of the federal rule. (Citations and quotations omitted)

See also United States v. One Parcel of Property located at 31-33 York St. Hartford, Connecticut, 930 F.2d 139, 141 (2d Cir. 1991) ("[A]s a matter of comity federal courts accord deference to state-created privileges.").

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[12] *Id.*

Federal courts should be "very reluctant" to meddle in "sensitive state activities." *Los Angeles County Bar Association v. Eu*, 979 F.2d 697, 703 (9th Cir. 1992). Few activities are more sensitive to the states than determining the best way to ensure adequate medical care for its citizens. There is a consistent body of policy determinations regarding peer review confidentiality: every state has enacted a medical peer review privilege. These legislative determinations reflect the considered opinion of each state, after carefully balancing the interests at stake.

Reason and experience should lead this Court to recognize the states' right to determine which privileges apply to their residents. As the *Jaffee* Court stated:

> In *Funk v. United States*, 290 U.S. 371, 54 S.Ct. 212, 78 L.Ed. 369 (1933), we recognized that it is appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both "reason" and "experience." *Id.*, at 376-381, 54 S.Ct., at 213-215. That rule is properly respectful of the states . . . . (*Jaffee v. Redmond, supra*, 518 U.S. 1, 13.)

The collective wisdom of the states should be properly respected in this case, as it was in *Jaffee*. Considerations of comity in this case cry out for the federal courts to yield to the interests of the states.[13] Indeed, this Court could deem the lower court's failure to accord comity to the state privilege to be such clear error as to warrant a grant of certiorari and reversal without oral argument.

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[13] Alternatively, upon granting certiorari, rather than invoking comity, the Court could fashion a federal common law privilege as it did in *Jaffee*.

At a minimum, the Court should address the divergence in the law between the federal and state governments so that those participating in the medical peer review process will know whether or not their communications are confidential.

E. Treatment of the Medical Peer Review Privilege Varies from Circuit to Circuit.

The circuit courts have not treated the medical peer review privilege uniformly. Compare:

- *United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 103 (5th Cir. 1992) (citing Congressional recognition of public policy in favor of privilege but deciding not to define scope of privilege);

- *Armstrong v. Dwyer*, 155 F.3d 211, 219 (3d Cir. 1998) (peer review privilege upheld in medical malpractice case under Peer Review Improvement Act of 1982; underlying purpose of statute consistent with federal and state peer review statutes);

- *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D. D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973)[14] (peer review privilege upheld in medical malpractice case);

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[14] The D.C. Circuit Court affirmed the lower court's decision without discussion. Such per curiam decisions become the law of the circuit and are binding upon the inferior courts of the circuit. (*See In re Thomas A. Cary, Inc.*, 412 F.Supp. 667, 670 (D.C. Va. 1976) (citing *Edelman v. Jordan*, 415 U.S. 651, 671 (1974), *aff'd*, sub nom *National Permanent Federal Sav. & Loan Assn. v. Virginia Concrete Co., Inc.*, 562 F.2d 47 14th Cir. 1977).

- *Purgess v. Sharrock*, 33 F.3d 134, 139 (2d Cir. 1994) (state medical peer review privilege outweighed by need for discovery in antitrust action); and

- *Memorial Hospital v. Shadur*, 664 F.2d 1058, 1062 (7th Cir. 1981) (state medical peer review privilege outweighed by civil rights plaintiffs' need for discovery.)

Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249 (D. D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973) was the first federal case to address the peer review privilege and remains the leading case. In *Bredice*, a plaintiff in a malpractice suit sought the production of defendant hospital's peer review materials that were created by committees of doctors acting pursuant to the requirements of the Joint Commission for the Accreditation of Hospitals. The *Bredice* court weighed the competing interests at stake and concluded that there was "an overwhelming public interest in having [physician peer review meetings] held on a confidential basis so that the flow of ideas and advice can continue unimpeded." *Id.* at 251. Accordingly, the district court held, and the Circuit Court for the District of Columbia affirmed, that the peer review privilege outweighed the litigant's right to discovery.

In *United States v. Harris Methodist Fort Worth*, 970 F.2d 94 (5th Cir. 1992), the United States sought a declaratory judgment that it was entitled to investigate physician staff privileges in a Title VI discrimination case. Citing Congressional recognition of the peer review privilege and *Bredice* with approval, the Fifth Circuit acknowledged the public policy in favor of the physician peer review privilege. (*United States v. Harris Methodist Fort*

Worth, supra 970 F.2d at 103.) Given that the *Harris* court had already determined that the proposed search was unreasonable, however, it decided not to define the scope of the privilege. At least one commentator has cited *Harris* for the proposition that "some courts have sought to . . . create a peer review privilege in circumstances outside academia, as in physician review panels."[15]

In *Memorial Hospital v. Shadur*, 664 F.2d 1058 (7th Cir. 1981), on the other hand, the Seventh Circuit considered a defendant hospital's petition to vacate a discovery order directing it to turn over peer review documents sought by plaintiff doctor in an antitrust case. The court ruled that plaintiff was entitled to those documents because his claim arose out of the disciplinary proceeding themselves. *Purgess v. Sharrock*, 33 F.3d 134, 139 (2d Cir. 1994) is in accord, but in *Syposs v. United States*, 179 F.R.D. 406 (W.D. N.Y. 1998), the district court ruled that the plaintiff patient's right to discovery in a medical malpractice case did not outweigh the defendant hospitals' interest in maintaining the confidentiality of peer review materials. There is thus widespread uncertainty as to whether, and under what circumstances, the peer review privilege will be given effect.

Confusion is also widespread as to the applicability of the self-critical analysis privilege in the medical peer review context. In *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182 (1990), the Court held that the self-critical analysis privilege did

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[15] James C. Francis IV, *Current Discovery Disputes*, C842 ALI-ABA 307, 316 (1993).

not extend to university peer review materials related to discrimination cases brought by the EEOC. No mention is made of the medical peer review privilege. Some courts have relied upon *University of Pennsylvania* to deny the medical peer review privilege, (*see, e.g., Syposs v. United States,* 179 F.R.D. 406, 411-412 (W.D. N.Y. 1998) while others have distinguished *University of Pennsylvania* in the medical peer review context (*see, e.g., United States v. Harris Methodist Fort Worth,* 970 F.2d 94, 103 (5th Cir. 1992) ("[u]nlike the privilege claim for faculty tenure decisions rejected in *University of Pennsylvania v. EEOC,* . . . the medical peer review process 'is a sine qua non of adequate hospital care.' " (citing *Bredice v. Doctors Hospital, Inc., supra* 50 F.R.D. at 250).[16] Courts attempting to address the federal self-critical analysis privilege have noted the inconsistences.[17] In light of these conflicting cases, certiorari should be granted so that the law applicable to the peer review privilege may be properly resolved by this Court.

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[16] *See also Weekoty v. United States,* 30 F. Supp. 2d 1343, 1345 (D.N.M. 1998) ("[b]ecause of this unique role in preserving the public health, medical morbidity and mortality reviews must be distinguished from other peer review cases").

[17] *See, e.g., Holland v. Muscatine General Hospital,* 971 F. Supp. 385, 390 (S.D. Iowa 1997) ("[t]he self-critical analysis privilege has had an ambiguous existence, neither uniformly adopted nor rejected"); *Morgan v. Union Pacific Railroad Co.,* 182 F.R.D. 261, 264 (N.D. Ill. 1998) ("[g]iven the vast array of inconsistent decisions on this issue, it would be understatement to say that it is unclear whether a federal self-critical analysis privilege exists").

II. CERTIORARI SHOULD BE GRANTED TO ADDRESS THE ISSUE OF WHETHER STATE OR FEDERAL PRIVILEGE LAW APPLIES IN FEDERAL CASES INVOLVING STATE AND FEDERAL CLAIMS. [*JAFFEE V. REDMOND*, 518 U.S. 1 (1996).]

This Petition offers the Court the opportunity to resolve an issue identified but expressly left undecided in *Jaffee v. Redmond*, 518 U.S. 1, 15 n.15 (1996):

> We note that there is disagreement concerning the proper rule in cases such as this in which both federal and state claims are asserted in federal court and relevant evidence would be privileged under state law but not under federal law . . . . Because the parties do not raise this question and our resolution of the case does not depend on it, we express no opinion on the matter.

This Court thus has left open the question of whether federal or state privilege law should be applied in mixed claim cases. Petitioner, of course, does not have mixed claims pending against him, just state claims. Under the plain language of Rule 501, he should be permitted to assert and enforce the privilege. If this Court so finds, then the proper disposition of this case would be to grant Dr. Schug's petition for certiorari and summarily reverse the decision below.[18]

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[18] As this Court reasoned in *Jaffee v. Redmond*, 518 U.S. 1, 15 n.15 (1996):

> [I]f petitioner had filed her complaint in an Illinois state court, respondents' claim of privilege would surely have been upheld, at least with respect to the state wrongful death action. An Illinois statute

Nonetheless, the Court has left unresolved the source of *any* privilege in supplemental jurisdiction cases. Every evidentiary privilege relied upon by litigants – be it peer review, the clergyman-penitent privilege or the scope of the work product rule – is compromised, because the holder cannot determine whether he is protected by the provisions of state law or federal common law. This uncertainty imposes significant transaction costs and may lead to unjust and inconsistent litigation results.

Unlike the petition in *Jaffee*, this Petition raises the issue directly: Dr. Schug is a defendant in federal court wholly as a result of the court's exercise of supplemental jurisdiction. He would unequivocally be able to assert the peer review privilege in state court. According to the federal courts below, however, he is barred from asserting that same privilege merely because he is in a federal forum. The Court can now determine whether this was the result contemplated by Congress when it wrote, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." FED. R. EVID. 501.

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provides that conversations between a therapist and her patients are privileged from compelled disclosure in any civil or criminal proceeding. Ill. Comp. Stat., ch. 740, § 110/10 (1994) . . . *Indeed, if only a state-law claim had been asserted in federal court, the second sentence in Rule 501 would have extended the privilege to that proceeding.* (Emphasis added.)

In mixed claim cases either state law applies to the state-law causes of action[19] or federal law applies to the state-law causes of action. Common sense and the language of Federal Rule of Evidence 501 dictate the former. Otherwise, different privileges would apply in state and federal court, which would, in effect, nullify the privileges.[20]

While *Jaffee* did not decide the issue of what law applies, the opinion offers valuable guidance on how the issue should be decided. The Court identified at least three pivotal factors in determining whether federal common law should recognize the privilege:

- whether the privilege protects critically important interests;
- whether the states have endorsed the privilege; and
- whether the privilege was among those proposed during the revision of the Federal Rules of Evidence.

All three criteria are met in this case:

- the quality of health care is a critically important interest that is protected by the peer review privilege;

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[19] *Freeman v. Fairman*, 917 F.Supp. 586, 588 (N.D. Ill. 1996) ("In plain terms, state privilege laws apply to state claims.") *See also Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1551 (10th Cir. 1995) (Motley "asserted both federal and state causes of action. As to the state causes of action, a federal court should look to state law in deciding privilege questions").

[20] *See Jaffee v. Redmond*, 518 U.S. 1, 13 (1996).

- the privilege has been universally adopted by all states; and

- it was the subject of one of the privileges proposed during the revision of the F.R.E.[21]

Federal Rule of Evidence 501 authorizes federal courts to define new privileges by interpreting "the principles of the common law . . . in the light of reason and experience." The Rule thus did not freeze the law governing privileges at a particular point in history, but rather directed courts "to continue the evolutionary development of testimonial privileges." *Trammel v. United States*, 445 U.S. 40, 47 (1980). Though federal law favors broad discovery, there are exceptions for the "public good transcending the normally predominant principle of utilizing

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[21] "The uniform judgment of the States is reinforced by the fact that a psychotherapist privilege was among the nine specific privileges recommended by the Advisory Committee in its proposed privilege rules." *Jaffee v. Redmond*, 518 U.S. at 13. With regard to the present case, the first of those nine specific privileges, Proposed Federal Rule of Evidence 502, created an evidentiary privilege for required reports: "A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent others from disclosing the return or report, if the law requiring it so provides." *Tharp v. Sivyer Steel Corp.*, 149 F.R.D. 177, 179 n.4 (S.D. Iowa 1993) (quoting PROPOSED FED. R. EVID. 502). State and federal law require peer review, so peer review proceedings would fall within this "required reports" exception. Though the proposed specific privileges were not adopted, the failure to adopt them should not be construed as a disapproval of their content. *Jaffee v. Redmond*, 518 U.S. at 15. Instead, the existence of a specific proposed privilege relating to the one asserted by Dr. Schug argues strongly for the Court's adoption of the peer review privilege under *Jaffee*. *Id.*

all rational means for ascertaining truth" or if the exception "promotes sufficiently important interests to outweigh the need for probative evidence." *Id.* at 50-51 (citation omitted). Without question, preserving the health and well-being of the public (as well as the legitimate policy prerogatives of the states) qualifies as such "public good."[22]

III. THERE IS AN INTERCIRCUIT SPLIT ON THE FUNDAMENTAL QUESTION OF WHEN A PARTY HAS THE RIGHT TO PURSUE A DIRECT APPEAL TO ASSERT A PRIVILEGE.

Dr. Schug's Petition presents the Court with an issue of extreme importance to litigants nationwide: When can a party who is without other recourse seek interlocutory appellate review from the federal courts to protect a privilege? A privilege, after all, is only as strong as the procedural means for asserting and protecting it.

The Court in *Perlman v. United States*, 247 U.S. 7 (1918) created an exception to the final judgment rule to answer this very question, but the circuits have since differed widely in defining the scope of the exception. In

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[22] Petitioner Schug endorses the related petition filed by Petitioners Redbud Community Hospital and Adventist Health, Inc., which raises the issue of the availability of peer review privileges in EMTALA cases. Dr. Schug, however, cannot be sued under EMTALA and so is named only in state claims. He has lost a valuable privilege simply because plaintiffs chose to file their complaint in the federal courthouse. That result is not rational. Thus, this case presents an excellent vehicle for resolving the issue of what privilege applies in federal supplemental jurisdiction cases.

Perlman, a grand jury issued a subpoena to obtain records from Perlman's bookkeeper. The Court recognized that under the final judgment rule Perlman was "powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way." The Court, however, was "unable to concur" with such an unjust result, so it created an exception that allowed the discovery's "target" to take a direct appeal from an order compelling someone else to disclose privileged or confidential information. *Id.* at 13.

The *Perlman* exception to the final judgment rule is widely recognized, but a clear conflict among the circuits has developed over its scope. Notably, the Ninth Circuit below refused to decide Dr. Schug's interlocutory appeal, construing its decision in *In re National Mortgage Equity Corp.*, 857 F.2d 1238 (9th Cir. 1988), so narrowly that it essentially eliminates the *Perlman* exception altogether.[23] The Fourth Circuit likewise limits *Perlman* to "disinterested" third parties, and thus would likely not permit Dr. Schug's appeal.[24]

By contrast, other circuits have read *Perlman* more expansively. For example, the District of Columbia Circuit interpreted the *Perlman* exception broadly, in a way that would surely encompass Dr. Schug: "The final-order doctrine, as a normal prerequisite to a federal appeal, is

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[23] The Ninth Circuit could have construed Dr. Schug's appeal as a permissive writ. *See Land v. Deeds*, 878 F.2d 318 (9th Cir. 1989). *See also* the Petition for Writ of Certiorari filed with the Court by co-parties Redbud Community Hospital and Adventist Health, Inc.

[24] *In re Pruett*, 133 F.3d 275, 281 n.10 (4th Cir. 1997).

not a barrier where it operates to leave the suitor 'powerless to avert the mischief of the order.' " *Nixon v. Sirica*, 487 F.2d 700, 707 n.21 (D.C. Cir. 1973) (quoting *Perlman*).[25] The Eighth Circuit also seems to read *Perlman* expansively,[26] interpreting *Perlman* as an extension of the Fourth Amendment's protection against unreasonable searches and seizures.[27] The Tenth Circuit has consistently applied *Perlman* and once crafted an even broader exception to the final judgment rule,[28] though that has since been abandoned.[29]

On the other hand, the Eleventh Circuit interprets *Perlman* as permitting "an order denying a motion to quash to be considered final as to the injured third party

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[25] *See also In re Grand Jury Investigation of Ocean Transp.*, 604 F.2d 672 (D.C. Cir. 1979).

[26] *See In re Faltico*, 561 F.2d 109, 110 n.2 (8th Cir. 1977) ("this court overruled the motion challenging jurisdiction, since the subpoena was directed to a third party . . . who could not be expected to expose himself to the penalty of contempt in order to obtain appellate review").

[27] *Schwimmer v. United States*, 232 F.2d 855, 860 (8th Cir. 1956) ("Refusal of the District Court to quash, as an unreasonable search and seizure, a subpoena duces tecum issued in a grand jury investigation is a final or appealable order").

[28] *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir.), *cert. den.*, 380 U.S. 964 (1965).

[29] *Boughton v. Cotter Corp.*, 10 F.3d 746, 749-750 (10th Cir. 1993); *see also Company X v. United States*, 857 F.2d 710 (10th Cir. 1988).

who is otherwise powerless to prevent the revelation."[30] In the Seventh Circuit, *Perlman* functions primarily as a bulwark to protect the assertion of the attorney-client privilege.[31] At the same time, the circuit views *Perlman* as an "exceptional situation."[32]

The Fifth Circuit observes that courts are reluctant to recognize exceptions to the final order rule,[33] but also interprets *Perlman* as "permitting appeal where denial of immediate review would render impossible any review of the party's claims" – a formulation that would encompass Dr. Schug's appeal.[34] The First Circuit follows a parallel path: "Perlman has been viewed restrictively, as an example of 'the limited class of cases where denial of

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[30] *In re Grand Jury Proceedings*, 832 F.2d 554, 558 (11th Cir. 1987) (discussing motions to quash grand jury subpoenae).

[31] *See In re Klein*, 776 F.2d 628, 630 (7th Cir. 1985) ("the holder of a privilege [is permitted] to intervene in order to assert the privilege and to appeal from the rejection of the assertion. . . . The rejection of the claim is the final decision with respect to the intervenor. . . . [B]ecause the person summoned before the grand jury may testify rather than go to jail to support someone else's privilege, the rejection of the claim is final as a practical matter too").

[32] *In re Special March 1974 Grand Jury Possible Violations of Title 18 and 26, United States Code*, 541 F.2d 166, 169 (7th Cir. 1976).

[33] "The Supreme Court has acknowledged only a limited number of exceptions to the general rule that pre-contempt disclosure orders are not appealable. . . . All of the recognized exceptions are extremely narrow, and the lower courts have been exceedingly chary of enlarging their scope." *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 877-878 (5th Cir. 1981).

[34] *Id.* at 878.

immediate review would render impossible any review whatsoever of an individual's claims.' "[35]

The Third Circuit recognizes that "contempt citations are not the exclusive means by which third parties may appeal from trial court discovery orders. . . . The noncustodian who asserts an interest in the documents is not subject to the contempt requirement. The conceptual basis for the dichotomy is found in the teachings of *Perlman v. United States.*"[36] The Second Circuit also focuses on the contempt issue, concluding that *Perlman* only applies when the appellant has no other means of challenging a discovery order by being held in contempt.[37]

Significantly, the Second Circuit notes that *Perlman*'s obscure language has complicated the interpretation and application of the rule: "It is hardly surprising that so Delphic a deliverance should give rise to differing interpretations."[38]

Given such widely divergent readings of *Perlman*, the rights of privilege holders are not equally protected in federal courts. For privileges to have meaning, procedures for asserting them must be clear. The Ninth Circuit's dismissal of Dr. Schug's direct appeal presents the

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[35] *Corporacion Insular de Seguros v. Garcia*, 876 F.2d 254, 258 (1st Cir. 1989) (quoting *United States v. Ryan*, 402 U.S. 530, 533 (1971)).

[36] *United States v. Cuthbertson*, 651 F.2d 189, 193 (3d Cir. 1981).

[37] *National Super Spuds, Inc. v. New York Mercantile Exchange*, 591 F.2d 174, 178 (2d Cir. 1979).

[38] *Id.*

appropriate vehicle for this Court to determine the scope of the *Perlman* exception to the final judgment rule. This case, therefore, gives rise to an opportunity for this Court to address an important procedural question that would only come to the Court in a privilege case like this one. Accordingly, the Court should grant certiorari on this question.

CONCLUSION

The quality of health care for all Americans rests in the hands of this Court. Hospitals and health care professionals are watching the outcome of this case closely. They know that a failure of the Court to grant certiorari and address the issues raised in this case will result in crippling uncertainty about the confidentiality of peer review in federal courts. Such uncertainty would stifle practitioners' voluntary participation in our country's primary mechanism for monitoring the quality of health care. Moreover, the petition raises important questions about the scope and applicability of *every* privilege and the standing of privilege holders to assert them.

In this case, therefore, the Court has the power to profoundly impact the country's public health, while addressing a sensitive federal/state balance regarding the

respect federal courts should give to state privileges. For these reasons, this case merits review by the Court.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In Re: REDBUD COMMUNITY HOSPITAL DISTRICT	No. 98-70610
REDBUD COMMUNITY HOSPITAL, ADVENTIST HEALTH, INC., Petitioner, v. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA Respondent, and DAVIS [sic] BURROWS, Successor-In-Interest to Cody Burrows, Deceased; DAVID BURROWS and RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows, Real Party in Interest.	D.C. No. CV-96-04345-SI
WOLFGANG SCHUG, M.D., Petitioner, v. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, Respondent, and	No. 98-70616 D.C. No. CV-96-04345-SI

DAVIS [sic] BURROWS, Successor-In-Interest to Cody Burrows, Deceased; DAVID BURROWS and RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows,

Real Party in Interest.

No. 98-16089

D.C. No. CV-96-04345-SI

DAVID BURROWS, Successor-In-Interest; CODY BURROWS, Deceased; RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows,

Plaintiffs-Appellees,

v.

REDBUD COMMUNITY HOSPITAL DISTRICT; M. FRED BREWER; ADVENTIST HEALTH INC.; JJ&R EMERGENCY MANAGEMENT GROUP INC.; EMERGENCY MEDICAL MANAGEMENT SERVICES, INC.,

Defendants,

and

WOLFGANG SCHUG, M.D.,

Defendant-Appellant.

ORDER

Before: HUG, Chief Judge, FLETCHER, and TROTT, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing. Judges Hug and Trott have voted to reject the suggestion for rehearing en banc, and Judge Fletcher so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In Re: REDBUD COMMUNITY HOSPITAL DISTRICT	No. 98-70610
REDBUD COMMUNITY HOSPITAL, ADVENTIST HEALTH, INC., Petitioner, v. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA Respondent, and DAVID BURROWS, Successor-In-Interest to Cody Burrows, Deceased; DAVID BURROWS and RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows, Real Party in Interest.	D.C. No. CV-96-04345-SI
WOLFGANG SCHUG, M.D., Petitioner, v. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, Respondent, and	No. 98-70616 D.C. No. CV-96-04345-SI

DAVID BURROWS, Successor-In-Interest to Cody Burrows, Deceased; DAVID BURROWS and RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows,

Real Party in Interest.

DAVID BURROWS, Successor-In-Interest; CODY BURROWS, Deceased; RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows,

Plaintiffs-Appellees,

v.

REDBUD COMMUNITY HOSPITAL DISTRICT; M. FRED BREWER; ADVENTIST HEALTH INC.; JJ&R EMERGENCY MANAGEMENT GROUP INC.; EMERGENCY MEDICAL MANAGEMENT SERVICES, INC.,

Defendants,

and

WOLFGANG SCHUG, M.D.,

Defendant-Appellant.

No. 98-16089

D.C. No. CV-96-04345-SI

ORDER*

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* This disposition is not appropriate for publication and may not be cited to or by the courts in this circuit except as provided by Ninth Circuit Rule 36-3.

Appeals from the United States District Court for the Northern District of California Susan Yvonne Illston, District Judge, Presiding
Argued and Submitted October 7, 1998
San Francisco, California

Before: HUG, Chief Judge, FLETCHER, and TROTT, Circuit Judges.

Dr. Schug's appeal is dismissed for lack of jurisdiction. *See In re National Mortgage Equity Corp. Mortgage Pool Certificates Litigation*, 857 F.2d 1238, 1240 (9th Cir. 1988). The consolidated petitions for writs of mandamus are denied. *See Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DAVID BURROWS and RHODA THOMAS,

Plaintiffs,

v.

REDBUD COMMUNITY HOSPITAL DISTRICT; ADVENTIST HEALTH INC.; J.J. & R. EMERGENCY MANAGEMENT GROUP, INC.; WOLFGANG SCHUG, M.D.; M. FRED BREWER, M.D. and DOES I through XXX.

Defendants.

_____/

No. C 96-4345 SI

ORDER:

1. DENYING PLAINTIFFS' MOTION TO STRIKE EX PARTE COMMUNICATIONS;
2. DENYING PLAINTIFFS' MOTION FOR SANCTIONS;
3. DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTION FOR RECONSIDERATION; and
4. RESOLVING PENDING DISCOVERY DISPUTES

INTRODUCTION

Cody Burrows, an eleven-month old infant, died after being transferred from Redbud Community Hospital to

Santa Rosa Community Hospital. David Burrows and Rhoda Thomas, Cody's parents, filed this lawsuit in federal court alleging violations of the federal Emergency Medical Treatment and Active Labor Act ("EMTALA"), as well as pendent state law claims for medical malpractice, wrongful death, emotional distress, and spoliation of evidence.

Defendants have requested reconsideration of this Court's "Order Regarding Applicability of California Evidence Code § 1157" filed January 13, 1998, in which the Court held that the state peer review privilege did not apply in the instant case. At issue were plaintiffs' discovery requests for documents produced during hospital peer review sessions after Cody Burrows' death. In the January 13 order, the Court first concluded that under EMTALA, federal law supplies the rule of decision, and therefore according to Federal Rule of Evidence 501, federal privilege law applies. Federal law does not recognize a peer review privilege. However, in the interest of comity the Court contemplated whether the state privilege should apply. The Court, relying on *Pagano v. Oroville Hospital*, 145 F.R.D. 683 (E.D. Cal. 1993), found that comity did not warrant the application of state privilege law.

Mindful of the then-pending criminal proceedings against defendant Schug, the Court waited to issue its order until Judge Warren rendered a decision regarding the applicability of Evidence Code § 1157 in the criminal context. On January 2, 1998, Judge Warren issued a ruling holding that § 1157 was inapplicable in the criminal proceedings against defendant Schug. This Court, no longer constrained by the impact its ruling on this issue might have on Dr. Schug's state criminal case, issued its order

on January 13, 1998. Immediately after this Court issued its order, defendants notified the Court by letter that the California Court of Appeals had stayed Judge Warren's ruling as the result of a Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief. Defendants also requested that this Court reconsider its opinion. On January 20, 1998, this Court granted defendants' request for reconsideration and set a briefing schedule on the matter. In the meantime, the Writ to the California Court of Appeals was denied on January 29, 1998. The defendants then petitioned the California Supreme Court for a stay and review. That petition was denied on February 4, 1998.

In addition to defendants' motion for reconsideration, the Court has before it plaintiffs' motion to strike defendants' allegedly *ex parte* communications with the Court, as well as plaintiffs' corresponding motion for sanctions. Plaintiffs argue that defendants' letters notifying the Court of the stay on Judge Warren's ruling and requesting reconsideration of this Court's order constituted impermissible *ex parte* communications.

DISCUSSION

A. Plaintiffs' Motions to Strike *Ex Parte* Communications and for Sanctions

Plaintiffs argue that defendants engaged in improper *ex parte* communications with the Court in violation of Civil Local Rule 11-3(c). Plaintiffs object that they were not provided prior notice of defendants' communications to the Court as required by the Local Rules, and that therefore these letters should be stricken. Plaintiffs argue

that defendants' letters invoke the power of the Court and seek judicial relief, thereby affecting plaintiffs' substantive rights. In addition, plaintiffs specifically object to the letter sent by Robert Lynch, counsel for defendant Schug, on the ground that although the letter indicates that plaintiffs were copied, plaintiffs in fact never received a copy of the letter. Plaintiffs request sanctions against Mr. Lynch.

Defendants respond that they have not engaged in *ex parte* communications with the Court because plaintiffs were copied on all correspondence. Defendants state that they sent letters to the Court because they viewed the matter as a discovery dispute, and had been previously informed to notify the court of such disputes by letter brief. With regard to the letter sent by defendant Schug, Mr. Lynch states that the failure to copy plaintiffs was due to inadvertent clerical error, but that plaintiffs were not prejudiced since defendant Schug sought the same relief – reconsideration – as sought by the other defendants.

As the Court has already decided to reconsider its January 13, 1998 order. In the Court's view, these letters were not impermissible *ex parte* communications, as plaintiffs' counsel was copied on all letters save one. As to defendant Schug's letter to the Court which plaintiffs never received, the Court is persuaded that the error was inadvertent and that counsel for defendant Schug did not act in bad faith. Accordingly, the Court DENIES plaintiffs' motions to strike and for sanctions.

B. Defendants' Motion for Reconsideration

Defendants advance numerous arguments in favor of their motions for reconsideration. To the extent that defendants reargue the same points, the Court will not reconsider these arguments. However, the Court will reconsider the new arguments raised by the parties.

Defendants first argue that plaintiffs' request for the peer review records only applies to the state law claim of spoliation, and thus state privilege law should apply to this claim. However, defendants' arguments fail for two reasons. First, plaintiffs contend that the records are relevant because the defendants, and other unknown persons who may be members of the Peer Review Committee, conspired to alter, destroy and falsify Cody's medical records with regard to the care and treatment he received during his stay at Redbud. This contention is common to all causes of action, including the federal cause of action under EMTALA. As such, federal privilege law governs.

Second, assuming arguendo that the evidence was relevant only to the spoliation claim, Federal Rules of Evidence dictate that privileges asserted in federal question cases shall be governed by federal law. State privilege law applies to purely state law claims brought in federal court pursuant to diversity jurisdiction. However, state law claims that are pendent to federal question cases are governed by federal privilege law. *See Wm. T. Thompson, Co. v. General Nutrition Corp., Inc.*, 671 F.2d 100, 104 (3d Cir. 1982); *Pagano v. Oroville Hospital*, 145 F.R.D. 683 (E.D. Cal. 1993); *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455, 458-459 (N.D. Cal. 1978). In the instant case the Court's jurisdiction is grounded on 28 U.S.C. § 1331

based on plaintiffs' EMTALA claims. Thus, federal privilege law applies.

Defendants next argue that even if federal privilege law applies, FRE 501 provides that in the absence of a controlling statute, courts look to common law principles to determine the applicability of evidentiary principles. *See Teasdale v. Marin General Hospital*, 138 F.R.D. 691, 694 (N.D. Cal. 1991). Federal courts in the Ninth Circuit have not yet adopted California's peer review privilege. Therefore, as provided by FRE 501, the question of whether § 1157 applies in federal court is "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" FRE 501. Reason and experience dictate that the Courts, in the interest of comity, look to state privilege law to ascertain the interests at stake.

Courts have held that there is no federal common law or statutory privilege protecting peer review medical records when the plaintiff's claim arises out of the disciplinary proceedings themselves. *See Pagano v. Oroville Hospital*, 145 F.R.D. 683, 691 (E.D. Cal. 1993) (holding that federal common law does not recognize medical peer review privilege in antitrust cases where the peer review itself is under attack). Courts have, however, recognized a peer review privilege in medical malpractice cases. *See Bredice v. Doctors Hospital*, 50 F.R.D. 249 (D. D.C. 1970), *aff'd* 479 F.2d 920 (D.C. Cir. 1973). Courts have drawn a distinction between medical malpractice and antitrust cases by reasoning that in medical malpractice cases the issue is whether the defendant was negligent in his care of the patient, not what transpired at a subsequent date during a peer review proceeding. *See Bredice*, 50 F.R.D.

249. In addition, disclosure of information contained in the peer review meetings would have little impact on a plaintiff's ability to prove his case. *See id.* On the other hand, in antitrust cases the claims arise out of the disciplinary proceedings themselves, and thus discovery is permitted since there would be no other source of the information. *See Memorial Hospital for McHenry County v. Shadur*, 664 F.2d 1058, 1062 (7th Cir. 1981).

Defendants argue that an EMTALA claim is essentially a medical malpractice claim, and thus the reasoning of the medical malpractice cases should apply. However, EMTALA claims are not grounded in tort concepts. *See Griffith v. Mt. Carmel Medical Center*, 842 F. Supp. 1359 (D. Kan. 1994). A plaintiff's claim in an EMTALA action does not rest on any proof that defendant was negligent, but rather is predicated on the hospital's violation of the EMTALA statute making the hospital strictly liable. Therefore, the Court is not persuaded that an EMTALA claim is analogous to a medical malpractice claim and thus does not apply the reasoning of those cases. In addition, the Court is persuaded that to the extent plaintiffs allege that Dr. Schug may have been instructed to create the addendum and burn his notes at the peer review meeting, plaintiffs' claim for spoliation of evidence and EMTALA depend on communications made during the peer review proceedings. Thus, this case is more like the antitrust cases than medical malpractice cases, since part of the claims arise out of the peer review meetings. Therefore, barring any overriding policy concerns, the state privilege does not apply in federal court.

Defendants argue that overriding policy concerns dictate that the state privilege should apply. First, they

argue that because state law requires medical practitioners to participate in the peer review sessions, it is unfair to then allow discovery of these meetings. Cal. Bus. & Prof. Code § 2282; Cal. Health & Saf. Code § 32128. Furthermore, defendants argue that § 1157 was instituted to encourage doctors to speak freely at such meetings in an effort to improve the quality to care. Therefore, defendants argue that the California legislature, in enacting § 1157, made a statutory promise to physicians that their self-critical commentary in peer review sessions would not be publicly disclosed. However, the action has been brought in federal court, and federal law, rather than state law, applies. Furthermore, recognizing a privilege under § 1157 would be inconsistent with the federal policy against privileges and in favor of broad disclosure.

Defendants also raise several constitutional issues. First, defendant Schug argues that emergency room doctors are more likely to be implicated in EMTALA actions than other doctors because EMTALA prevents the transfer of medically unstable patients, a situation more frequently encountered in the emergency room. Therefore, defendant Schug argues that disclosing peer review records creates a constitutionally-suspect distinction between emergency room physicians and other doctors in California. Defendant reasons that if peer records are discoverable in EMTALA actions, emergency room doctors cannot rely on confidentiality, whereas non-emergency room doctors can rely on this protection.

The Court is not persuaded by such reasoning. The status of being an emergency room doctor is not a protected characteristic warranting strict scrutiny analysis;

therefore, any classification resulting from this Court's order must meet the rational basis test. As long as there is some rational basis for the classification, the equal protection clause is not implicated. Here, the federal policies favoring disclosure and discovery in order to ascertain truth in the litigation context provide a rational basis for the classification, and therefore defendant's equal protection rights have not been violated.

Defendant Schug also argues that disclosure of the peer review records will deprive him of due process of the law. He contends that the right to pursue an occupation is a fundamental right, therefore, the government cannot impair his right to practice his profession without due process. *See Ender v. Schutzbank*, 68 Cal. 2d 162, 169 (1968). However, defendant Shug's [sic] reasoning is flawed because he is being accorded due process since he is receiving a full hearing in which he can present his defense. *See id.* at 172. Therefore, defendant fails to convince the Court that disclosure will violate his due process rights.

Finally, defendant Schug argues that disclosure will violate his right to privacy in the peer review records. California recognizes a constitutional right to privacy which is consistent with federal law and therefore can be considered in deciding whether or not to disclose the peer review records. *See Pagano*, 145 F.R.D. at 695. The Court considers the following factors in determining the scope of protection to be accorded in the privacy context:

> (1) [T]he probable encroachment of the individual's privacy right if the contested action is allowed to proceed, and the magnitude of the encroachment; (2) whether the encroachment of

> the privacy right would impact an area that has traditionally been off limits from most regulation; (3) whether the desired information is available from other sources with less encroachment of the privacy right; (4) the extent to which the exercise of the individual's privacy rights impinge on the rights of others; and (5) whether the interests of society at large encourage a need for the proposed encroachment.

Pagano, 145 F.R.D. at 698-99.

In *Pagano*, the Court reasoned that fourth and fifth factors, which both bear on the policies favoring discovery, outweighed the first two factors which bear on the degree of encroachment. This is because discovery and admissibility of relevant truthful information affect the individual rights of litigants as well as the public interest. As one court has noted, "litigation has the tendency to make public the sort of information that individuals would otherwise prefer to keep private. Public disclosure, in the end, is not only natural and generally unavoidable but also necessary and healthy to a process so dependent on truth and accuracy." *Cook v. Yellow Freight System, Inc.*, 132 F.R.D. 548, 551 (E.D. Cal. 1990) (as cited in *Pagano*, 145 F.R.D. at 699). In addition, the names of patients and physicians were kept confidential in order to minimize the degree of encroachment upon the privacy rights of individuals. Finally, because the information sought was not available from other sources, the third factor also weighed in favor of disclosure.

In applying the five factors above, the Court finds the reasoning in *Pagano* persuasive. Here, the only relevant information is that directly related to the care of Cody.

Furthermore, in Dr. Shug's [sic] criminal trial, the peer review records have already been discovered. Therefore, the balance of the five factors enumerated above, as well as the overall federal policy favoring broad disclosure, convince this Court that disclosure does not impermissibly violate Dr. Schug's right to privacy, especially since the information has already been revealed in the criminal context.

In conclusion, the Court finds that the hospital peer review records are discoverable, subject to a protective order. The parties are directed to submit a stipulated protective order providing for disclosure but ensuring the privacy of the physicians other than Dr. Shug [sic]. The Court, may at a later time and for good cause shown, entertain a motion for disclosing the identity of the physicians insofar as it is relevant to the plaintiffs' case. The information disclosed pursuant to this order shall be designated as "Confidential Material," and shall be used solely in connection with this litigation, or related appellate procedures, and not for any other purpose.

C. Pending discovery disputes

During a case management conference on February 23, 1998, counsel for plaintiffs informed the Court that he believed there were numerous unresolved discovery disputes pending before the Court. Plaintiffs have since submitted a letter identifying these pending disputes, which plaintiffs contend are still pending from plaintiffs' Motion to Compel submitted October 22, 1997. It is this Court's understanding, as well as defendants', that this

Court's November 3, 1997 order resolved all the discovery disputes as raised in plaintiffs' motion, except those dependent upon the Court's ruling on the applicability of § 1157. In the interest of clarity, the Court will reiterate what is already contained in the November 3, 1997 order: (1) defendants Redbud and Adventist have not waived their privileges because a privilege log had been produced; (2) plaintiffs are limited to 25 interrogatories per defendant; (3) defendant Adventist is ordered to produce documents #2, 6, 8, and 9; (4) defendant Redbud is ordered to produce documents # 14 and 17. Furthermore, because the Court is now ruling that § 1157 is not applicable in federal court, to the extent that defendants objected to any discovery disputes on the basis of the applicability of § 1157, they are now ordered to respond.

Defendant Adventist correctly notes that if the Court rules that § 1157 is not applicable, Adventist will be required to answer plaintiffs' First Set of Interrogatories to defendant Adventist Health. However, Adventist is only required to answer numbers 1, 2a, 2b, 2c, 3e, 3f, 3g, 3h, 3i, 3j, 4, 5a, 5b, 5c, 5d, 5e, because this comports with the 25 interrogatory limit imposed in the Court's November 3, 1997 Order. In addition, Adventist concedes that it will have to produce Mr. Schultz for further deposition if § 1157 is not applicable. However, because Mr. Schultz has been previously deposed, this deposition should be limited to subject matter thought to be protected by § 1157 which is no longer protected.

Defendant Schug requests further opportunity to brief the issues regarding his deposition, interrogatories and document production because he contends that previous briefing focused primarily on his fifth amendment

rights. The Court declines to grant this request because the parties have been given ample time to raise all objections. As such, any discovery which was withheld on the basis of § 1157 is now ordered to be produced, including interrogatories, depositions, and documents.

With respect to the deposition of Ms. DeLashmutt, the Court construes plaintiffs' request as a motion to complete her deposition. The Court has read the portions of the deposition submitted by plaintiffs and will allow plaintiffs to complete the deposition because it agrees that defendants' counsel impermissibly coached Ms. DeLashmutt. All parties should be advised that objections should not be used to attempt to coach a witness. *See Hall v. Clifton Precision*, 150 F.R.D. 525, 531 (E.D. Pa. 1993). All objections to form of the question should be succinct and clearly state the objection. Further objections based on privilege should merely state the privilege asserted.

CONCLUSION

For the foregoing reasons, plaintiffs' motion to strike *ex parte* communications and for sanctions is DENIED and defendants' motion for reconsideration is DENIED in that § 1157 does not apply in federal court, but is GRANTED with respect to a protective order of materials discovered.

IT IS SO ORDERED.

Dated: May 5, 1998

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DAVID BURROWS, et al., Plaintiffs, v. REDBUD COMMUNITY HOSPITAL DISTRICT, et al., Defendants. _____/	No. C 96-4345 SI **ORDER REGARDING APPLICABILITY OF CALIFORNIA EVIDENCE CODE § 1157**

In their objections to a number of plaintiffs' discovery requests, defendants Redbud and Adventist raised claims of privilege under California Evidence Code § 1157, which substantially limits discovery into the proceedings and records of hospital medical staffs concerned with evaluation and improvement of the quality of care in a hospital. During an earlier discovery conference, plaintiffs sought to compel responses to the challenged discovery requests, contending that the limitations imposed on California courts by § 1157 do not apply in federal court.

Plaintiffs then-pending discovery disputes were partially resolved by this Court's order filed November 3, 1997. However, at that time Superior Court Judge Warren had under submission the question of whether Evidence Code § 1157 applied in the state criminal case pending against Dr. Schug: prosecutors were seeking, and defendant Schug was resisting, production of such records. In

the interest of protecting Dr. Schug's right to a fair criminal trial, this Court refrained from ruling on the applicability of § 1157 in the federal context until the state court had issued its ruling on the matter.

On January 2, 1998, Judge Warren issued a ruling, holding § 1157 was inapplicable in the criminal context presented there, thereby allowing prosecutors to subpoena hospital records claimed to be privileged under § 1157. *In re Search Warrant No. 13489*, San Francisco Superior Court, 1/2/98. Given Judge Warren's ruling, this Court is no longer constrained by the impact its ruling on this issue might have on Dr. Schug's state criminal case.

For the following reasons, the Court concludes that § 1157 is not applicable in this action.

DISCUSSION

Section 1157 provides that proceedings and records of hospital medical staffs concerned with evaluation and improvement of the quality of care in the hospital shall not be subject to discovery. California Evidence Code § 1157 (West 1997). The section further states that no person who attends a meeting of these committees shall be required to testify as to what transpired at that meeting. *Id.*

The existence of privilege in cases in federal court is governed by Rule 501 of the Federal Rules of Evidence, which provides:

> [T]he privilege of a witness, person, government, State, or political subdivision thereof shall

> be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof, shall be determined in accordance with State law.

Defendants assert that § 1157 applies in this action because of the Emergency Medical Treatment and Active Labor Act of 1986 ("EMTALA"), 42 U.S.C. § 1395dd, incorporates state damages law to the extent that plaintiffs are allowed to "obtain those damages available for personal injury under the law of the state in which the hospital is located." 42 U.S.C. § 1395dd(d)(2)(A). Defendants argue that state law therefore provides the rule of decision, and thus state privilege law governs. Plaintiffs counter that § 1157 is inapplicable in a federal question case such as the instant action, and that when federal and state claims are joined in the same action, claims of privilege are determined under federal law. *See William T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982).

This issue appears to be one of first impression. Plaintiffs are correct that ordinarily federal privilege law applies in federal question cases. However, EMTALA is unlike many federal laws in that it incorporates state law, thus requiring a different analysis of the issue than that put forth by plaintiffs.

Other courts have faced a question similar to that presented here when applying state privileges to federal

actions under the Federal Tort Claims Act. The Federal Torts Claim Act [sic] requires federal courts to look to the law of the state where the act or omission occurred in order to determine government liability. 28 U.S.C. § 1346(b). Thus, the Federal Tort Claims Act, like EMTALA, incorporates state tort law to some extent. In *Menses v. United States Postal Services*, 942 F. Supp. 1320 (D. Nev. 1996), the court held that the incorporation of state law did not mean that "state law supplies the rule of decision" for purposes of FRE 501. *Accord Young v. United States*, 149 F.R.D. 199 (S.D. Cal. 1993). In reviewing the legislative history of FRE 501, the *Menses* court stated, "Congress recognized that when federal courts merely adopt state law as federal law, there is no need to apply state law in matters such as the admissibility of evidence and claims of privilege, and that federal privilege law controls. It is only where state law is operative of its own force that state law supplies the rule of decision, and, under Rule 501, state privilege law governs." *Id.* at 1322. A state law is self-operative if state law provides the source of the right sued upon. In these cases, "no federal interest justifies overriding a state substantive law such as evidentiary privileges, and to do so would promote forum shopping and lead to an inequitable administration of the laws between state and federal courts." *Id.* In contrast, if the right sued upon has a federal source, then state law is incorporated or adopted as federal law, and federal interests in applying federal evidence rules and privileges outweigh any countervailing state interests.

The Court concludes that FRE 501 does not require the application of § 1157 to the instant action. In an EMTALA action, state substantive law is not operative of

its own force. Rather, EMTALA establishes federal requirements for medical screening, stabilizing treatment, and restriction of transfers until the patient is stabilized. 42 U.S.C. § 1395dd(a)-(c). The statute creates a private right of action under *federal law* against offending hospitals, and incorporates state law only in the determination of damages.

Although federal courts are not required to apply state privileges law to federal question cases, federal courts may do so in the interest of comity. "[A]s a matter of comity, federal courts should attempt to ascertain what interests inspire relevant state doctrine and should take into account the views of state authorities about the importance of those interests." *Kelly v. City of San Jose*, 114 F.R.D. 653, 656 (N.D. Cal. 1987). In determining whether to apply a state privilege, a federal court should first analyze whether application of the state law would be inconsistent with federal law. *See Pagano v. Oroville Hospital*, 145 F.R.D. 683, 688 (N.D. Cal. 1993). If the state law is not inconsistent, the federal court should attempt to apply the state privilege in harmony with federal privileges law.

In *Pagano v. Oroville Hospital*, the court declined to apply § 1157 to a federal antitrust action, finding there is no clearly recognized federal peer review privilege and that § 1157 is too absolute in its application and effect, and therefore too inconsistent with federal law, to be applicable. *Id.* at 690. The court reasoned that disclosure in that case was necessary because the evidence sought was relevant to the plaintiff's allegations that the hospital had conspired to eliminate the plaintiff as a competitor in providing medical services.

The Court finds the *Pagano* court's reasoning instructive, and declines to apply § 1157 to the instant case. Section 1157 acts as an absolute shield against discovery, and this Court agrees with the *Pagano* court that such absolute protection against discovery is inconsistent with the flexibility of federal privilege law. Plaintiffs have alleged that defendants conspired to falsify Cody Burrows' medical records, and that the evidence they are seeking – to which defendants have raised claims of privilege under § 1157 – is relevant to their spoliation of evidence claim. As a general matter, the Court finds that such evidence may be relevant to this claim, and holds that § 1157 is inapplicable in this action. Defendants may, of course, raise other claims of privilege to these documents if applicable.

IT IS SO ORDERED.

Dated: January 9, 1998

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

APPENDIX E

California Evidence Code § 1157
(California's Peer Review Privilege)

§ 1157. Proceedings and records of organized committees having responsibility of evaluation and improvement of quality of care; exceptions

(a) Neither the proceedings nor the records of organized committees of medical, medical-dental, podiatric, registered dietitian, psychological, or veterinary staffs in hospitals, or of a peer review body, as defined in Section 805 of the Business and Professions Code, having the responsibility of evaluation and improvement of the quality of care rendered in the hospital, or for that peer review body, or medical or dental review or dental hygienist review or chiropractic review or podiatric review or registered dietitian review or veterinary review or acupuncturist review committees of local medical, dental, dental hygienist, podiatric, dietetic, veterinary, acupuncture, or chiropractic societies, or psychological review committees of state or local psychological associations or societies having the responsibility of evaluation and improvement of the quality of care, shall be subject to discovery.

(b) Except as hereinafter provided, no person in attendance at a meeting of any of those committees shall be required to testify as to what transpired at that meeting.

(c) The prohibition relating to discovery or testimony does not apply to the statements made by any person in attendance at a meeting of any of those committees who is a party to an action or proceeding the subject

matter of which was reviewed at that meeting, or to any person requesting hospital staff privileges, or in any action against an insurance carrier alleging bad faith by the carrier in refusing to accept a settlement offer within the policy limits.

(d) The prohibitions in this section do not apply to medical, dental, dental hygienist, podiatric, dietetic, psychological, veterinary, acupuncture, or chiropractic society committees that exceed 10 percent of the membership of the society, nor to any of those committees if any person serves upon the committee when his or her own conduct or practice is being reviewed.

(e) The amendments made to this section by Chapter 1081 of the Statutes of 1983, or at the 1985 portion of the 1985-86 Regular Session of the Legislature, or at the 1990 portion of the 1989-90 Regular Session of the Legislature, do not exclude the discovery or use of relevant evidence in a criminal action.

APPENDIX F

PEER REVIEW PRIVILEGE STATUTES OF THE 50 STATES

ALA. CODE § 22-21-8 (1997)

ALASKA STAT. §§ 18.23.030, 18.23.070 (Michie 1997)

ARIZ. REV. STAT. § 36-445.01 (1997)

ARK. CODE ANN. §§ 20-9-304, 20-9-503 (Michie 1997)

CAL. EVID. CODE § 1157 (Deering 1997)

COLO. REV. STAT. § 13-21-110 (1997)

CONN. GEN. STAT. § 19a-17b (1997)

DEL. CODE ANN. tit. 24, § 1768 (1997)

D.C. CODE ANN. § 32-505 (1997)

FLA. STAT. ch.766.101 (1997)

GA. CODE ANN. §§ 31-7-133, -140, -143 (1997)

HAW. REV. STAT. § 624-25.5 (1997)

IDAHO CODE §§ 39-1392, 39-1392a-f (1997)

225 ILL. COMP. STAT. ANN 60/5, 735 ILL. COMP. STAT. ANN. 5/8-2101 (West 1997)

IND. CODE ANN. §§ 34-30-15-1 to -3, -8, -9 (Michie 1998)

IOWA CODE § 147.135 (1997)

KAN. STAT. ANN. § 65-4915 (1997)

KY. REV. STAT. ANN § 311.377 (Michie 1996)

LA. REV. STAT. ANN. § 13: 3715.3 (West 1998)

ME. REV. STAT. ANN. tit. 32, § 3296 (West 1997)

MD. CODE ANN., HEALTH OCC. §§ 14-501, 14-503 (1997)

MASS. ANN. LAWS ch. 111, § 204 (Law. Co-op. 1998)

MICH. STAT. ANN. § 14.15 (21515) (Law. Co-op. 1997)

MINN. STAT. § 145.64 (1997)

MISS. CODE ANN. § 41-63-9 (1997)

MO. REV. STAT. § 537.035 (1997)

MONT. CODE ANN. §§ 7137-2-201, 50-16-201 to 205 (1997)

NEB. REV. STAT. ANN. §§ 71-2046 to -2048 (Michie 1997)

NEV. REV. STAT. ANN. § 49.265 (Michie 1997)

N.H. REV. STAT. ANN §§ 151:13-a, 329:29 (1997)

N.J. STAT. ANN. § 2A:84A-22.8 (West 1997)

N.M. STAT. ANN § 41-9-5 (Michie 1997)

N.Y. EDUC. LAW § 6527 (Consol. 1998)

N.C. GEN. STAT. § 131E-95 (1997)

N.D. CENT. CODE §§ 23-34-01 to -03 (1997)

OHIO REV. CODE ANN. §§ 2305.251, 2305.252 (Anderson 1998)

OKLA. STAT. tit. 63, § 101709 (1997)

OR. REV. STAT. § 41.675 (1997)

PA. STAT. ANN. tit. 63, §§ 425.2, 425.4 (West 1997)

R.I. GEN. LAWS § 5-37.3-7 (1997)

S.C. CODE ANN. §§ 40-71-10, -20 (Law. Co-op. 1997)

S.D. CODIFIED LAWS § 36-4-26.1 (Michie 1998)

TENN. CODE ANN. § 63-6-219 (1997)

TEX. REV. CIV. STAT. ANN. art. 4495b (West 1998)

UTAH CODE ANN. §§ 26-25-1, -3 (1997)

VT. STAT. ANN. tit. 26 §§ 1441, 1443 (1997)

VA. CODE ANN. § 8.01-581.17 (Michie 1997)

WASH. REV. CODE ANN. § 4.24.250 (West 1997)

W. VA. CODE § 30-3C-3 (1997)

WIS. STAT. § 146.38 (1997)

WYO. STAT. ANN. § 35-17-105 (Michie 1997)